No. 92-1988

RECEIVED
HAND DELIVERED
OCT 22 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.

Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' OPPOSITION TO MOTION TO DEFER FURTHER PROCEEDINGS

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, NW
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co., and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corp.

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Co.

JOEL I. KLEIN*
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
Suite 225
2445 M Street, NW
Washington, DC 20037-1435
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESTON & TATUM
1 Maritime Plaza, Ste. 2000
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

* Counsel of Record

8 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 92-1988

TICOR TITLE INSURANCE COMPANY, et al.,

Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**PETITIONERS' OPPOSITION
TO MOTION TO DEFER FURTHER PROCEEDINGS**

Petitioners respectfully oppose the motion of respondents to defer briefing and oral argument in this case. This Court granted certiorari on October 4, 1993. At the same time, it set an expedited briefing schedule, with the opening brief due shortly (November 16) and an expectation that oral argument will be heard early next year. Now that the Court has granted the petition, we suggest, these proceedings should go forward while the parties continue the drawn-out and uncertain process required before any settlement will moot the case, which is unlikely to occur before the Court resolves the important question on which certiorari was granted.

This Court granted certiorari to review a decision of the Ninth Circuit imposing significant constitutional constraints on the Federal Rules of Civil Procedure's provision for nationwide mandatory class actions. As the grant of the petition confirms, the case presents a question of great significance to the federal judicial system warranting this Court's immediate resolution. This process should not be derailed in this case, with the inevitable postponement in providing litigants and lower courts a definitive answer to the question, unless there is so high a likelihood that the case will become moot before this Court's decision that the Court's expenditure of resources in deciding the case will predictably prove wasted. There is no such likelihood.

Contrary to respondents' assertion (Resp. Motion at 3), there continues to be a live case or controversy in this case. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 n.3 (1978) ("[P]etitioner in this case . . . did not stipulate to dismissal to its petition. In view of the tentative nature of the settlement, this case is not moot."). As is apparent from the Memorandum of Understanding attached to respondents' motion, for the case to become moot, a definitive class-action settlement agreement still has to be negotiated between counsel for the parties; any resulting settlement proposal will have to be submitted to the district court for preliminary approval under

Rule 23, Fed. R. Civ. P.; notice in an agreed-to form, an opportunity for objections, and a hearing will have to be provided; the district court will have to approve the proposed form of notice or insist on modifications (and the parties will have to decide whether to accept any such modifications); the court will have to consider any objections made to the settlement and decide whether to insist on modifications as a condition of approval; each party will have to decide whether to accept any such modifications or to withdraw its agreement to the proposed settlement; if the district court approves a final settlement, the parties will have to await the running of the time for appeals by any objecting class member (30 days, under Fed. R. App. P. 4) or await the outcome of any appeal actually filed, which might result in reversal of the district court approval followed by further proceedings in district court. State regulatory agencies will also have to approve any settlement; that process, too, might be unsuccessful or produce demands for modification that, in turn, could scuttle a final settlement. None of this has yet occurred.

Respondents themselves estimate that the process will take up to six months (i.e., until May 1994). Resp. Motion at 3. Petitioners believe that there is a reasonable prospect that it will take significantly longer. Lengthy delay is especially likely if class members object and pursue appeals; and that

prospect is hardly unlikely in this case, itself a case brought by objecting members of an earlier class challenging as inadequate the settlement of the earlier class action. Indeed, the original settlement in the underlying action, which respondents have challenged in this case, took almost three years to become final -- more than eight months for the district court process (Pet. App. 31a, 35a) and approximately two additional years for appeals (id. at 78a, 79a). Finally, of course, it is possible that, in the end, no settlement will survive this review process.

In these circumstances, particularly given the expedited schedule in this Court, it is reasonable to expect that this case will remain live at the time of an anticipated decision, in the spring of 1994. Because the issue presented warrants this Court's immediate resolution, we submit, the case should proceed in this Court. At the same time, petitioners will diligently pursue the settlement process. We will inform the Court immediately if and when the case becomes moot.[1]

---

1 Respondents cite one case in support of their deferral request, Henson v. East Lincoln Township. Resp. Motion at 3. But since any such request must be judged on its own facts, the granting of deferral in that one case hardly means that deferral should be granted here. Notably, in Henson, the parties jointly asked for deferral of proceedings, presumably reflecting a shared assessment of the likelihood of ultimate mootness (and, perhaps, of the relative unimportance of immediate resolution of the legal question presented).

Respectfully submitted,

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, NW
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co., and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corp.

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Co.

JOEL I. KLEIN*
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
Suite 225
2445 M Street, NW
Washington, DC 20037-1435
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESTON & TATUM
1 Maritime Plaza, Ste. 2000
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petitioners' Opposition to Motion to Defer Further Proceedings in Ticor Title Insurance Company, et al. v. Walter Thomas Brown and Jeffrey L. Dziewit, et al., No. 92-1988, were served by first-class mail, postage pre-paid, this 22nd day of October 1993, on the following:

Gerald D.W. North
Gerald D.W. North & Associates
A Professional Corporation
7902 N. Black Canyon Hwy., #210
P.O. Box 35010
Phoenix, Arizona 85069-5010

Aram A. Hartunian
Aram A. Hartunian & Associates
A Professional Corporation
122 South Michigan Avenue
Chicago, Illinois 60603

Ronald L. Futterman
Futterman & Howard, Chtd.
122 South Michigan Avenue
Chicago, Illinois 60603

Kelly Reed
Kelly Reed, P.C.
P.O. Box 9219
Scottsdale, Arizona 85252-9219

Ted M. Warshafsky
Robert P. Goldstein
Warshafsky, Rotter, Tarnoff, Gesler, Reinhardt & Bloch
839 North Jefferson Street
Milwaukee, Wisconsin 53202

Richard G. Taranto
Richard G. Taranto

RECEIVED
HAND DELIVERED
OCT 22 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

92-1988

RECEIVED
HAND DELIVERED
NOV 16 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Petitioners and Joint Appendix in No. 92-1988, Ticor Title Insurance Co. et al. v. Brown and Dziewit, were sent by Federal Express on this 15th day of November, 1993 to:

Gerald D.W. North
Dennis L. Hall
Gerald D.W. North & Associates, P.C.
3800 N. Central Avenue
Phoenix, AZ 85012

Joel I. Klein